In the Supreme Court of the United States

October Term, 1978

No. 78-559

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

GORDON McDOWELL and MRS. PATSY D. McDOWELL,

Real Parties in Interest.

PETITION FOR WRIT OF CERTIORARI

LA FOLLETTE, JOHNSON, SCHROETER
& DE HAAS
GABRIELE PRATER, ESQ.
320 North Vermont Avenue
Los Angeles, California 90004
Telephone: 213/666-3600

Attorneys for Petitioner
Southern Pacific
Transportation Company

Westside Law Publishers Santa Monica, California (213) 451-1714

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

INDEX OF APPENDICES

(Appendices are filed separately herewith)

In the Supreme Court of the United States

October Term, 1978
No. _____

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent.

GORDON McDOWELL and MRS. PATSY D. McDOWELL,
Real Parties in Interest.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Southern Pacific Transportation Company,, petitions this Court for a Writ of Certiorari to review the decision of the Superior Court of the State of California for the County of Los Angeles allowing a cause of action for loss of consortium to remain in this lawsuit which was brought under the Federal Employers' Liability Act. The

Court of Appeal of the State of California, Second Appellate District, Fifth Division, and the Supreme Court of the State of California refused to set aside said decision.

JURISDICTIONAL BASIS

On or about March 20, 1978, plaintiffs Gordon McDowell and Mrs. Patsy D. McDowell, filed their first amended complaint for personal injuries under the Federal Employers' Liability Act against petitioner herein. Said complaint included two causes of action for loss of consortium by plaintiff, Mrs. Patsy D. McDowell. Petitioner filed demurrers to said causes of action for loss of consortium.

On April 12, 1978, the Honorable Jeff Whitehill, Judge Pro Tem of the Superior Court of the State of California for the County of Los Angeles, overruled petitioner's demurrers contrary to established federal case law interpreting the Federal Employers' Liability Act by which California State Courts are bound.

On or about May 11, 1978, petitioner filed a petition for Writ of Mandate, or, in the alternative, a Writ of Prohibition with the Court of Appeal of the State of California, Second Appellate District, Fifth Division, in which it requested the appellate court to compel respondent Superior Court to adhere to the federal interpretation of the Federal Employers' Liability Act and to sustain petitioner's demurrers. Said petition was denied on June 8, 1978.

On or about June 19, 1978, petitioner filed a petition for hearing with the Supreme Court of the State of California praying for the same relief. Hearing was denied on July 5, 1978.

Jurisdiction to review the respondent court's ruling regarding petitioner's demurrers is conferred on this Honorable Court by virtue of 28 U.S.C. Section 1257 which provides in pertinent part:

> "Final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By Writ of Certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised, under the United States."

Jurisdiction, furthermore, is conferred on this Court by Rule 19(a) of the Supreme Court rules which states that a review on Writ of Certiorari may be granted:

> "Where a State Court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

In the present case, the Federal Employers' Liability Act defines the extent of liability to which a railroad carrier in interstate commerce is subject. Petitioner claims the right not to be held liable for loss of consortium damages under said federal statute. Furthermore, the Federal Employers' Liability Act has been interpreted by

the United States Supreme Court and federal appellate courts as precluding a recovery for loss of consortium. Nevertheless, the respondent court permitted such cause of action to remain in this suit. Thereby, the respondent court has decided a federal question in a way not in accord with the applicable decisions of this Court. The denial of a hearing on the matter by the California Supreme Court constitutes a final judgment under 28 U.S.C. 1257. *State of Missouri ex rel. St. Louis B. & M. Ry. Co. v. Taylor*, 266 U.S. 200 (1924); *Michigan Central Railroad v. Mix*, 278 U.S. 492 (1929); *Madruga v. Superior Court of the State of California in and for San Diego County*, 346 U.S. 556 (1954). It follows that this Honorable Court has jurisdiction to review the ruling of respondent court.

QUESTIONS PRESENTED FOR REVIEW

Is real party in interest, Mrs. Patsy D. McDowell, entitled to bring a cause of action for loss of consortium against petitioner under the provisions and construction of the Federal Employers' Liability Act?

Is real party in interest, Mrs. Patsy D. McDowell, entitled to bring an action for loss of consortium asserted as a separate and distinct cause of action on a common law theory of negligence when her husband's injuries occurred under circumstances covered by the Federal Employers' Liability Act?

FEDERAL STATUTE INVOLVED

The Complaint of the real parties in interest is based on the Federal Employers' Liability Act, 45 U.S.C. Section 51 which provides:

"LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE; DEFINITION OF EMPLOYEES.

Every common carrier by railroad while engaging in commerce between any of the several States or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, effect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASE

Petitioner, Southern Pacific Transportation Company, is a defendant in an action now pending in the Superior Court of the State of California for the County of Los Angeles, entitled *Gordon McDowell and Mrs. Patsy D. McDowell v. Southern Pacific Transportation Company, et al.*, Case No. C 219 263. The original complaint in said action was filed on November 4, 1977, and an amended complaint was filed on March 20, 1978. Said complaint alleges that the real party in interest, Gordon McDowell, had suffered injury while acting in the course of employment for petitioner due to petitioner's negligence; specifically, that he was injured by a locomotive while attempting to board it. As a third and fourth cause of action, the real party in interest, Patsy D. McDowell, sought damages for loss of consortium due to her husband's injury. She asserted said cause of action both under the provisions of the Federal Employers' Liability Act and as a separate and distinct cause of action based on a common law theory of negligence. Petitioner filed demurrers to said third and fourth causes of action.

The real parties in interest opposed petitioner's demurrers contending that the Federal Employers' Liability Act by implication permits a loss of consortium recovery because such recovery had been granted to the spouses of injured seamen apparently bringing suit under the Jones Act which incorporates FELA. The real parties in interest further maintained that the Federal Employers' Liability Act does not preclude a loss of consortium action based on a common law theory of negligence and asserted as a separate cause of action.

Petitioner in its demurrers cited the court to numerous United States Supreme Court, California Supreme Court and California Appellate Court decisions which hold that the Federal Employers' Liability Act supersedes the common law and state laws, and that the recovery under the Act is exclusive of all others. In particular, petitioner quoted the language of the California Supreme Court in *Davee v. Southern Pacific Company*, 58 Cal.2d 572, 576 (1962) which reads:

> "By the Federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail; and all state laws upon that subject were superseded."

Petitioner, furthermore, cited the court to numerous federal and state court decisions which consistently held that the Federal Employers' Liability Act does not permit recovery for loss of consortium even where it is asserted as a separate and distinct cause of action under common law. In particular, petitioner quoted from the United States Supreme Court decision in *New York Central and Hudson River Railroad v. Tonsellito*, 244 U.S. 360 (1917) which to date is the controlling authority regarding loss of consortium under the Federal Employers' Liability Act:

> "The court of errors and appeals ruled, and it is now maintained, that the right of action asserted by the father existed at common law and was not taken away by the Federal Employers' Liability Act. But the contrary view, we think, is clearly settled by our recent opinions in *New York C. etc. R. Co. v. Winfield*, 244 U.S. 147 . . . and *Erie R. Co. v. Winfield*, 244 U.S. 170 .... *There we held the act 'is comprehensive and also exclusive' in respect of a railroad's liability for*

> *injuries suffered by its employees while engaging in interstate commerce.* 'It establishes a rule or regulation which is intended to operate uniformly in all the states as respects interstate commerce, and in that field it is both paramount and exclusive.'
>
> "*Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in this specified class, such liability can neither be extended nor abridged by common or statutory laws of the state.*" (Emphasis added.)

Petitioner cited the court to numerous federal appellate court and state court decisions which followed *Tonsellito* and struck down loss of consortium claims in situations similar if not identical to the present one, specifically *Jess v. Great Northern Railway Company*, (9th Cir. 1968) 401 F.2d 535, 536, which held:

> "The Federal Employers' Liability Act not only provides exclusive remedy for recovery by an employee of damages sustained by him as a result of an injury to him, *but also governs recovery by others for damages resulting from such injury*." (Emphasis added.)

At the hearing of the demurrers, petitioner, furthermore, referred the court to previous briefs filed by petitioner in support of a previous demurrer involving the same issues, which demurrer had been sustained with leave to amend. Specifically, petitioner addressed the real parties' in interest argument that a loss of consortium recovery is permissible by implication under the Federal Employers' Liability Act since such recovery has been granted to injured seamen apparently under the Jones Act which incorporates FELA.

Various United States Supreme Court cases were cited to the court indicating that for constitutional reasons, FELA is never incorporated into the Jones Act where its incorporation would have the effect of restricting remedies available to seamen under general maritime law. It was further brought to the attention of the court that the decisions cited by the real parties in interest granting a loss of consortium recovery in maritime cases are based on a construction of general maritime law and not on a construction of the Jones Act.

The court took the matter under submission and, on April 12, 1978, issued its order overruling petitioner's demurrers.

Petitioner then filed a Petition for Writ of Mandate, or, in the alternative, a Writ of Prohibition with the Court of Appeal of the State of California in which it requested the appellate court to compel respondent court to vacate its order and to issue an order sustaining petitioner's demurrers.

Again, petitioner cited the court to the case of *New York Central and Hudson River Railroad v. Tonsellito*, 244 U.S. 360 (1917) and the numerous cases following that authority. Again, petitioner brought to the court's attention the distinction between maritime law and the Jones Act and that the cases relied upon by the real parties in interest allow a loss of consortium recovery under a construction of general maritime law and not of the Jones Act, thereby, bearing no relevance to the Federal Employers' Liability Act.

Again, petitioner quoted from *Davee v. Southern Pacific Railroad Company*, 58 Cal.2d 572 (1962) and cited other California Supreme and Appellate court decisions holding that the Federal Employers' Liability

Act supersedes state laws and that California courts are bound by the federal interpretations of said Act.

The petition for Writ of Mandate or, in the alternative, Writ of Prohibition was denied by the Fifth Division of the Second Appellate District on June 8, 1978.

Subsequently, on June 19, 1978, petitioner submitted its petition for hearing to the Supreme Court of the State of California urging the same issues and authorities. On July 5, 1978, said court denied a hearing on the matter.

REASONS WHY WRIT SHOULD BE GRANTED

The respondent court has decided the federal question, whether or not the Federal Employers' Liability Act permits recovery for loss of consortium, in a way not in accord with the applicable decisions of this court. As stated above, the controlling authority to date regarding this issue is the case of *New York Central and Hudson River Railroad v. Tonsellito*, 244 U.S. 360 (1917) which has been followed by numerous federal appellate courts and state courts and which denies recovery.

Congress enacted the Federal Employers' Liability Act to define what rights of action injured railroad employees may assert against their employers engaged in interstate commerce and to control the extent of liability railroad carriers are subject to.

The purpose of the Act is to establish a rule which would operate uniformly in all states. Congress has *preempted the field* of rights and remedies available to injured railroad employees against their employers, and all state laws concerning the subject are superseded. State courts are bound to adhere to the rights and remedies provided by the Act and its construction by federal courts.

Respondent court, by failing to follow the federal authorities, flies in the face of Congressional intent and frustrates the federal statutory scheme.

If state courts are not compelled to follow the law as enacted by Congress and interpreted by the United States Supreme Court, the uniformity found so necessary for the efficient operation of interstate commerce will be destroyed.

CONCLUSION

Petitioner respectfully requests that this Honorable Court grant the instant Petition for Writ of Certiorari and compel respondent court to adhere to the federal authorities and sustain petitioner's demurrers.

Respectfully submitted,

LA FOLLETTE, JOHNSON, SCHROETER
& DEHAAS
GABRIELE PRATER

Attorneys for Petitioner,
Southern Pacific Transportation Company